RECEIVED
MAY 15 1974

Supreme Court, U. S.
FILED
MAY 14 1974
MICHAEL RODAK, JR., CLERK

No. 73-1395

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1395

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE J. WILSON, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. The Brief in Opposition to the petition for a writ of certiorari argues that there "appears no meaningful conflict among the Courts of Appeals regarding the appealability of a post-conviction order dismissing an indictment" (Opp. 2). We respectfully submit that this conclusion is based upon respondent's misreading of the relevant opinions in this area. Contrary to respondent's suggestion and the holding below, the crucial factor in those cases in determining whether the post-conviction order was an "acquittal" was whether the order of dismissal was based on a determination that the evidence was sufficient to sustain the conviction. The decision below departs from these precedents by holding that the "critical" fact (Pet. App. 8A) in de-

539-955—74——1

termining whether a post-conviction order is an acquittal is *not* whether the district court's order is based on a finding that the evidence was insufficient to warrant conviction, but rather whether the district court relied on evidence heard at trial (regardless of whether the dismissal is based on the sufficiency of the evidence). That holding is inconsistent with the manner in which *United States* v. *Sisson*, 399 U.S. 267, has been applied by every other court of appeals that has considered the issue.

a. Respondent argues that *United States* v. *Whitted*, 454 F. 2d 642 (C.A. 8), is distinguishable from the instant case because "[n]o reliance on trial testimony was shown" (Opp. 5). However, the opinion of the district court, which was expressly referred to by the court of appeals, shows clearly that the district court in fact relied upon evidence heard at the trial as a basis for the post-conviction order dismissing the indictment. In describing the proceedings below, the court of appeals observed (454 F. 2d at 643):

> The trial court, 325 F.Supp. 520, dismissed the indictment on March 23, 1971, stating: "*During the course of the jury trial defendant's entire testimony before the Grand Jury was read to the trial jury. I have carefully studied this testimony,* that of other witnesses who testified before the Grand Jury, and the entire proceedings which led up to the returning by that tribunal of the indictment against the defendant, and have concluded that it is impossible to determine whether the indictment against the defendant was returned on the basis of evidence or by the possible prejudice and bias of jurors or both, and accordingly must therefore dismiss the indictment." [Emphasis supplied.]

Moreover, the court of appeals in *Whitted* expressly reaffirmed the settled definition of an acquittal, *i.e.*, an order based on the insufficiency of the evidence to sustain a conviction (454 F. 2d at 646). Plainly, that standard was rejected here when the court of appeals held that a dismissal based upon pre-indictment delay was an acquittal.

b. In *United States* v. *Weinstein*, 452 F. 2d 704 (C. A. 2), certiorari denied *sub nom. Grunberger* v. *United States*, 406 U.S. 917, which respondent argues "demonstrates no disparity in this area" (Opp. 3), the court of appeals held that, under the definition adumbrated in *Sisson*, a post-conviction order terminating a prosecution is an acquittal—regardless of the label—if "the [trial] judge believed that, with the evidence taken in the light most favorable to the Government, it would still not support a conviction" (452 F. 2d at 714). Applying that test to the case before it, the court of appeals held that a post-judgment-of-conviction order dismissing an indictment in the interest of justice was not an acquittal even though the order was based on evidence heard at the trial going to the general issue in the case.

Similarly, the most recent opinion of the Court of Appeals for the Second Circuit applied the same standard. In *United States* v. *Jenkins*, 490 F. 2d 868 (C.A. 2), petition for a writ of certiorari filed April 8, 1974 (No. 73-1513), the court of appeals held that an order dismissing an indictment after a trial without a jury was an acquittal. But, again, the court of appeals

looked to the same standard established by *Sisson* that it had recognized in *United States* v. *Weinstein, supra*. Judge Friendly, writing for the court of appeals in *Jenkins*, observed (490 F. 2d at 880): "*Sisson* held that when a guilty verdict had been nullified by a judge's decision to acquit *on the merits*, the Double Jeopardy clause prevented an appellate court from directing the entry of a judgment of conviction" (emphasis supplied). Like *Sisson*,[1] and unlike this case and *United States* v. *Weinstein, supra*, the district court in *Jenkins* held—in effect—that the evidence was insufficient to warrant a conviction.[2]

c. *United States* v. *McFadden*, 462 F. 2d 484 (C.A. 9), cited by respondent (Opp. 5), like *United States* v. *Jenkins, supra*, involved a post-trial dismissal of an indictment in a Selective Service case. In holding that

[1] Jenkins was charged with knowingly failing to report for induction as ordered. The district court dismissed the indictment—after trial—on the ground that Jenkins was not legally bound to obey the order because the local board had refused erroneously to reopen his classification to consider a post-induction claim for treatment as a conscientious objector.

[2] In *United States* v. *Velazquez*, 490 F. 2d 29 (C.A. 2), petition for a writ of certiorari filed April 1, 1974 (No. 73-6493), cited by respondent (Opp. 5), the court of appeals held that a *pre-trial* dismissal of an indictment *was* appealable and announced that the Double Jeopardy Clause was intended "to limit to one the number of times a defendant may be required to submit proof of his innocence to challenge or acceptance by the other side" (490 F. 2d at 34). Here, of course, the defendant has been required to submit proof of his "innocence" only once, and a successful appeal by the United States would result in the entry of a judgment of conviction, not a new trial. Accordingly, assuming *Velazquez* is relevant in a post-guilty-verdict context, its reasoning is clearly inconsistent with that of the court of appeals in the instant case.

the order was not appealable, the Court of Appeals for the Ninth Circuit wrote (462 F. 2d at 486):

> [T]here was in fact a trial on an indictment that alleged an offense and no matter how the judge characterizes his order after having tried the case, it can only be a judgment of acquittal. The defendant's asserted constitutional privilege not to be required to fight in a particular war goes to the general issue so the court's post-trial order must be held to be a judgment of acquittal. United States v. Sisson, 399 U.S. 267 * * *.

In the present case, the defendant's asserted right to a fair trial, which was allegedly prejudiced by an unnecessary pre-indictment delay, is not one that "goes to the general issue" in the case. *United States* v. *Marion*, 404 U.S. 307, 312.

d. *United States* v. *Esposito*, 492 F. 2d 6 (C.A. 7), certiorari denied, No. 73-432, January 7, 1974, cited by respondent (Opp. 5-6), is likewise consistent with *Sisson* and the cases discussed above. There, the district court entered a post-conviction order in arrest of judgment based upon the unconstitutionality of the statute that the defendant was accused of violating. Rejecting the argument that the order was an acquittal, the Court of Appeals for the Seventh Circuit emphasized that, although the order of the district court alluded to evidence heard at the trial, the basis of the dismissal did not go to the general issue in the case (492 F. 2d at 9):

> [I]t is clear from the order that the [district] court concluded that the fatal defect in the prosecution lay in the indictment's failure

> to state and the statute's failure to require a nexus with interstate commerce which would justify federal regulation. The fact that the prosecution failed to prove such a connection, though alluded to in the order, was of no significance to the actual basis for the decision. The order was neither based upon nor limited in application to the facts of the case. Appeal, therefore, is not barred by the double jeopardy clause of the fifth amendment.

In sum, except for the holding below, the courts of appeals have construed *United States* v. *Sisson* to define an acquittal as a post-trial order "entered on the ground that the Government did not present evidence sufficient to prove [an essential element of the offense]" (*United States* v. *Sisson, supra,* 399 U.S. at 299). They reject the proposition, adopted below, that an "acquittal" results from the mere fact that the district court relies on evidence heard at the trial in dismissing an indictment (after conviction) on grounds which do not relate to the sufficiency of the evidence.

2. We argued in our petition that, even if the order of the district court be labelled an acquittal, an appeal is not barred by the Double Jeopardy Clause because petitioner would not be subject to a retrial if the United States prevailed on its appeal. Since the jury has already convicted respondent, all that is at issue is whether the district court should be directed to enter a judgment of conviction in accord with the verdict of the jury.

We have also raised this issue in our petition for a writ of certiorari (No. 73-1513) in *United States* v. *Jenkins, supra,* which the Court may wish to consider at

the same time it acts on the petition for a writ of certiorari here. We have shown in our petition in *Jenkins* that the present rules applicable to appeals from post-conviction dismissals or acquittals are neither consistent nor rational. These cases, we believe, present the Court with an opportunity to clarify a confused area of the law which is of fundamental importance to the administration of justice in the federal courts.

CONCLUSION

For the reasons stated in our petition and this reply brief, it is respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974